Supreme Court, U.S.
FILED
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88-1702

No. _____

In The

Supreme Court of the United States

October Term, 1988

STEVEN G. LILVES,

Petitioner,

vs.

KIMBEL J. STUART,

Respondent.

On Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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30 pp

I.

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER STATE COURTS SHOULD BE PERMITTED TO EVADE THE REQUIREMENTS OF THE FULL FAITH AND CREDIT CLAUSE BY IGNORING THAT ISSUE, AFTER IT HAS BEEN PROPERLY BROUGHT TO THEIR ATTENTION?

B. WHETHER, AFTER A PLAINTIFF HAS BROUGHT AN ACTION IN THE COURTS OF CALIFORNIA, AND HAS HAD HIS CASE DISMISSED PURSUANT TO THE LAWS OF CALIFORNIA, HE MAY THEREAFTER BRING THE SAME ACTION IN THE COURTS OF COLORADO AGAINST THE SAME DEFENDANT AND OBTAIN A JUDGMENT IN HIS FAVOR NOTWITHSTANDING THE PRIOR CALIFORNIA JUDGMENT?

II.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as shown in the caption. Counsel for the respondent, Kimbel J. Stuart, was James A. Martell, Esq. of Wyatt and Martell, Fort Collins, CO 80521.

Petitioner was represented at the Colorado trial and before the Colorado Court of Appeals by James K. Keane, Esq. of Boulder, CO 80302, who was also co-counsel in the Petition for Writ of Certiorari to the Colorado Supreme Court.

In the California action brought by Respondent against the Petitioner, Respondent was represented by David C. MacPherson, Esq. and Petitioner, was represented by Charles B. Tunnell, Esq., both members of the California Bar.

III.

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A. Decision of the Colorado Court of Appeals, No. 87 CA 0623, Stuart v. Lilves, announced October 6, 1988.

B. Order of the Colorado Court of Appeals denying Mr. Lilves' Petition for Rehearing. November 3, 1988.

C. Order of the Supreme Court, State of Colorado, denying Mr. Lilves' Petition for Writ of Certiorari, February 27, 1989.

D. Order, District Court of Larimer County in Stuart v. Lilves, No. 85 CV 1052, Oct. 8, 1986 (The decision appealed to the Colorado Appellate Court, as shown above).

E. Order for Entry of Summary Judgment In Favor of Defendant, in Stuart v, Lilves, No. 121198, Superior Court of the State of California, County of Marin, October 11, 1985. (This is the decision which Petitioner claims should have barred all of the above decisions based upon the Full Faith and Credit Clause).

V

JURISDICTIONAL STATEMENT

A. Decision of the Colorado Court of Appeals announced October 6, 1988

B. Order of the Colorado Court of Appeals denying rehearing, November 3, 1988

C. Order of the Supreme Court, State of Colorado denying Petition for Certiorari, February 27, 1989

D. Statutory Authority conferring jurisdiction on this Court – 28 USC 1257(3)

VI

APPLICABLE CONSTITUTIONAL, STATUTORY AND CODE PROVISIONS

A. Constitution of the United States, Article IV, Section 1

B. 28 USC 1738

C. California Code of Civil Procedure, Sec. 580(b)

(all set forth in Appendix F)

VII

STATEMENT OF THE CASE

In 1981, Petitioner, Steven G. Lilves (Mr. Lilves), residing in Corte Madera, California, purchased from Respondent, Kimbel J. Stuart (Mr. Stuart) a parcel of real estate located in Fort Collins, Colorado. Mr. Lilves caused his attorney in fact to execute a Promissory Note and Purchase Money Deed of Trust for the purpose of securing the unpaid balance of the purchase price. The purchase contract was entered into in California, and was performable in Marin County, California. Mr. Lilves' Note and Deed of Trust was junior to one previously executed by Mr. Stuart to the Public Trustee of Larimer County for

the benefit of First Capitol Mortgage Company, which entity foreclosed thereon and the property was sold pursuant to the Senior Deed of Trust in March 1984. In January 1985, Mr. Stuart initiated his action against Mr. Lilves in the Superior Court, Marin County, California for the full amount of the Note Secured by the Purchase Money Deed of Trust of 1981. (These facts were all found by the Superior Court of California and set forth in its Order for Summary Judgment – App. E).

Mr. Stuart did not appeal the California decision but instead brought an identical action against Mr. Lilves in the District Court, Larimer County, Colorado later in 1985. Mr. Lilves filed a Motion to Dismiss the Colorado Complaint on the basis of res judicata and the Full Faith and Credit Clause (Vol. I, p. 20). This Motion was denied and the Larimer County District Court proceeded to grant judgment to Mr. Stuart (App. D).

Mr. Lilves perfected a timely appeal to the Colorado Court of Appeals and again relied upon res judicata and the Full Faith and Credit Clause in his brief to that Court. The judgment below was affirmed with no mention of the Full Faith and Credit Clause (App. A). Mr. Lilves, after denial of his petition for rehearing, filed a Petition for Certiorari with the Supreme Court of the State of Colorado relying totally on the Full Faith and Credit Clause. This petition was denied (App. C).

At the hearing before the Colorado District Court, the attorney for Mr. Stuart admitted:

> "I think we even agree on what criteria must be satisfied for the doctrine of *res judicata* to apply: You have to have the same parties. You have to have the same cause of action. It has to be a judgment on the

merits. It has to be a final judgment. And it has to be a judgment by a court of competent jurisdiction.

Obviously, it is the same parties. In both cases, Kim Stuart was the Plaintiff and Steven Lilves was the Defendant.

It is the same cause of action. It is a suit on a promissory note in both cases, and it is the same promissory note.

The decision based upon summary judgment in California is a final decision and we are not arguing that. That is certainly appealable. It was not appealed, but it was a final decision for purposes of appeal.

And the Marin County Court is certainly a court of competent jurisdiction.

The only dispute, I think, is whether or not the California decision was a decision on the merits of the case. It is our position that decision was not on the merits; that it was based solely upon the California anti-deficiency statute; that it was a preliminary matter or a technical matter and was not a consideration of the merits." (Vol. 2, p. 5).

VIII

ARGUMENT

A. THE WRIT SHOULD BE GRANTED TO REMIND STATE COURTS THAT THEY CANNOT EVADE THE FULL FAITH AND CREDIT CLAUSE BY IGNORING ITS EXISTENCE.

In this case the Courts of Colorado were reminded of the Clause and simply ignored it. They judged the California decision to see if it had been made on the merits according to Colorado standards. There was not even an effort to determine its *res judicata* effect under California Law despite the determination by this Court that:

> "Full faith and credit thus generally requires every state to give a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it."

(*Durfree v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963)).

Durfree v. Duke, is not an isolated or forgotten statement. In more recent years this Court has restated the principle that to determine the preclusive effect of an earlier judgment by a state court, sister state courts faced therewith must give it the same effect it would have been given in the courts of the state which rendered the initial judgment. (*Migra v. Warren City School District Board of Education*, 465 U.S. 75, 85, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)).

A simple denial of the writ in this case would defeat this court's role as "the arbiter of the extent of the exceptions [to the Clause]" (*Magnolia Petroleum Company v. Hunt*, 320 U.S. 430, 438, 64 S.Ct. 208, 88 L.Ed. 149 (1943)).

The criteria enunciated by this Court to determine the preclusive effect of a sister state judgment must be applied even if the public policy of the two states differ. So long as the original forum had jurisdiction over the subject matter and the parties, which is not contested here, such judgment must be given the same preclusive effect it would have received in the state where rendered even if such judgment is "repugnant" to the statutes of the later forum state (*Roche v. McDonald*, 275 U.S. 450, 452, 48 S.Ct. 142, 72 L.Ed. 365 (1928)).

Although California Code Sec. 560(b) (the codification of its anti-deficiency statute) is at odds with Colorado law on the same subject, this is not a valid reason to allow the Colorado Courts to ignore the Clause and 28 USC 1738. To the contrary:

> "It is when a clash of policies between two states emerges that the need of the Clause is the greatest. It and the statute which implements it are indeed designed to resolve such controversies . . . It is the judgment that must be given full faith and credit. In neither case can its integrity be impaired, save for attacks on the jurisdiction of the court that rendered it."

(*Union National Bank of Wichita, Kansas v. Lamb*, 337 U.S. 33, 42, 69 S.Ct. 1492, 93 L.Ed. 1190 (1948))

State courts need to be forcefully reminded that:

> "For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity."

(*Broderick v. Rosner*, 294 U.S. 629, 643, 55 S.Ct. 589, 79 L.Ed. 1100 (1935))

The requirement imposed by the Clause remains viable though the claim or defense raised in the courts of the initial forum would not be allowed in the court where the later action has been brought (see *Morris v. Jones*, 329 U.S. 545, 551, 67 S.Ct. 451, 91 L.Ed. 492 (1947))

These rules are particularly appropos since it was Mr. Stuart who chose the California courts for his initial forum, and was thus "master to decide what law he will rely upon." (*The Fair v. Kohler Die & Specialty Co.*, 228 U.S.

22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913)) The importance of the plaintiff's choice of initial forum in the application of the Clause to subsequent out of state actions was underscored by this Court (*Migra, supra,* at 465 U.S. 84-85 and note 7).

B. THE JUDGMENT GRANTED IN FAVOR OF MR. LILVES WOULD HAVE BEEN GIVEN RES JUDICATA EFFECT IN CALIFORNIA, AND THUS SHOULD SERVE TO PRECLUDE A JUDGMENT IN FAVOR OF MR. STUART ON THE SAME CLAIM IN COLORADO.

The California Code of Civil Procedure, unlike the Federal Code of Civil Procedure is actually a codification of a great deal of California substantive law. The legislative history and the substantive purpose of the anti-deficiency statute which became Sec. 580(b) are well described in a California decision. (*Prunty v. Bank of America,* 37 Cal. App. 3rd 439, 112 Cal. Reptr. 370, 374-375 (1974)). Examination of this decision can leave no doubt that under California law a decision made pursuant to 580(b) is a decision on the merits which is entitled to full faith and credit in a subsequent action on the same note and deed of trust brought in the courts of Colorado.

This issue has been litigated in only one case outside of California that counsel has been able to find and in that case it was held that a decision under Sec. 580(b) was a decision entitled to the full faith and credit clause of the U.S. Constitution (*Catchpole v. Narramore,* 102 AZ 248, 248 P.2d 105 (1967)).

The defense provided by Sec. 580(b) in California law is equally available although the real property is located

in another state (e.g. *Hersch and Company v. C & W Manhattan Associates,* 700 F.2d 476, 478, n. 2 (9th Cir. 1983) (applying California Law); *Younker v. Manor,* 225 Cal. App. 2d 431, 63 Cal. Reptr. 197 (1967)).

Further in California, a summary judgment of dismissal is a sufficient basis for a claim of *res judicata* (*State Farm Mutual Automobile Insurance Co v. Salazar,* 318 P.2d 210, 213 (Cal. App. 1957)).

IX

CONCLUSION

State Courts may not be allowed to judge the claims preclusion effect of a sister state judgment by local standards rather than those which would govern in the state where the initial judgment was rendered. Since this case involves the continuing vitality of the Full Faith and Credit Clause, which is central to our federal system, this Court should grant the writ and reverse the decision below to insure that state courts do not evade the Clause by ignoring its existence.

Respectfully submitted,

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Attorney for Petitioner,
Steven G. Lilves

APPENDIX A

COLORADO COURT OF APPEALS

No. 87CA0623

KIMBEL J. STUART,
Plaintiff-Appellee,
v.
STEVEN G. LILVES,
Defendant-Appellant.

Not Selected for Publication

Appeal from the District Court of Larimer County
No. 85CV1052

Honorable James H. Hiatt, Judge
(Filed October 6, 1988)

DIVISION I — JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Sternberg and Reed, JJ., concur

Wyatt & Martell
James A. Martell
Fort Collins, Colorado
Attorneys for Plaintiff-Appellee

James J. Keane
Boulder, Colorado
Attorney for Defendant-Appellant

Defendant, Steven G. Lilves, appeals a summary judgment entered in favor of plaintiff, Kimbel J. Stuart. We affirm.

Plaintiff originally filed suit in California. That court granted summary judgment in favor of defendant based on a finding that the action was barred by California statute. Defendant contends that the doctrine of *res judicata* barred this subsequent suit. We disagree.

If there is an existing judgment, the doctrine of *res judicata* bars any subsequent suit between the parties on the same claim. *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985). However, *res judicata* applies only to a judgment on the merits. A judgment based on preliminary, subsidiary or technical grounds is not on the merits. *Saunders v. Bankston*, 31 Colo. App. 551, 506 P.2d 1253 (1972).

The trial court correctly concluded that the merits of plaintiff's claim had not been reached because the claim was precluded by statute. *See W.R.S. v. E.R.*, 41 Colo. App. 414, 588 P.2d 379 (Colo. App. 1978).

Defendant's contention regarding attorney fees cannot be reviewed as the transcript of the hearing on that issue was not included in the record on appeal. That decision is one within the discretion of the trial court, and, without a showing otherwise, no abuse of that discretion is assumed. *See In re Marriage of Hahn*, 628 P.2d 175 (Colo. App. 1981).

Judgment affirmed.

JUDGE STERNBERG and JUDGE REED concur.

APPENDIX B

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 87CA0623

ORDER

KIMBEL J. STUART, v. STEVEN G. LILVES,

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 12-5-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Pierce, J
Sternberg, J
Reed, J

[Seal]

DATED: 11-3-88

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 88SC588
Certiorari to the Colorado Court of Appeals 87CA0623
Larimer County District Court 85CV1052

ORDER OF COURT
(Filed February 27, 1989)

STEVEN G. LILVES,

Petitioner,

v.

KIMBEL J. STUART,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 27, 1989.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

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Honorable James H. Hiatt
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[Seal]

APPENDIX D

DISTRICT COURT, LARIMER COUNTY,
STATE OF COLORADO

Case No. 85CV1052

ORDER

KIMBEL J. STUART,

Plaintiff,

vs.

STEVEN G. LILVES,

Defendant.

THIS MATTER is before the undersigned District Judge with regard to Plaintiff's and Defendant's Motion for Summary Judgment. This action was brought by Plaintiff against Defendant as a suit on a promissory note executed on May 7, 1981, in the original amount of $18,000.00, and secured by a deed of trust constituting a lien on property to be found within Larimer County. The note is now in default.

Each side previously filed a Motion for Summary Judgment which was denied by the Court. Thereafter, the parties jointly filed a Motion for Reconsideration, requesting that the Court reconsider the issue of summary judgment, each party asserting therein that there were no contested issues of material fact, and that, as a matter of law, one party or the other was entitled to summary judgment. It appears that since the Court initially denied both motions for summary judgment, Defendant has abandoned his defense of lack of personal

jurisdiction, and has submitted to the jurisdiction of the Court and agrees that this Court has personal jurisdiction over him (see paragraph 11 of the Motion for Reconsideration).

The only issue to be resolved by the Court is whether the doctrine of res judicata bars Plaintiff's action. Plaintiff initially filed an action on the same promissory note against Defendant in the state of California, this lawsuit being filed on January 8, 1985. On October 11, 1985, the California court granted Defendant's Motion for Summary Judgment, finding that the California lawsuit was barred by California's anti-deficiency statute (Section 580(b) of the California Code of Civil Procedure). Colorado has no such bar. Plaintiff then pursued this action in Colorado.

The parties agree that four of the five criteria necessary for the doctrine of res judicata to be invoked exist in this case. That is, the parties are identical, the cause of action is identical, the California order is a final judgment (the same was not appealed by Plaintiff), and the California court was a competent court having personal and subject matter jurisdiction. The only issue to be resolved is whether or not the California order granting Defendant's Motion for Summary Judgment due to the anti-deficiency statute constitutes a judgment *on the merits*, so that the Colorado action is barred by the doctrine of res judicata. The Court concludes that the California order was not a judgment on the merits, so that the doctrine of res judicata does not bar Plaintiff's Colorado suit. This is so not because the issue was presented to the court in California by means of a motion for summary judgment, but because the grounds relied upon by the court did not

go to the merits of Plaintiff's Complaint, but related to a statutory bar rendering such claim unenforcable in California. Indeed, the merits of Plaintiff's claim could not have been reached by the California court because of Section 580(b), California Code of Civil Procedure. See *Smith vs. Cowell,* 92P20, 41, 178 (Colo. 1906); *Dash vs. Rubey,* 357 P2d 81, 144 Colo. 481 (Colo. 1961); *Board of Commissioners of Lake County vs. Schradsky,* 71P1104, 31 Colo. 178 (Colo. 1903). Dismissal of Plaintiff's action in California on the grounds stated by the California court is more analogous to dismissal for want of jurisdiction than to a ruling on the merits. See also *Trujillo vs. State of Colorado,* 649F 2d 823, C.A. Colo. 1981.

It appears to the Court that the case which most closely approaches the facts and the legal issues in the case at bar is *W.R.S. vs. E.R.,* 588 P2d 379, 41 Colo.App. 414 (Colo. App. 1978). In that case an individual brought a paternity action, which was dismissed on the grounds that the paternity laws as they then existed did not allow a putative father to bring such an action. Thereafter, the law changed, the Uniform Parentage Act having been adopted in 1977. Subsequent to the effective date of such Act, the individual brought another paternity action. Respondent alleged and the trial court concluded that the putative father was barred by the doctrine of res judicata from pursuing his second paternity action. On appeal the Colorado Court of Appeals stated that "the 1974 action was dismissed because the statute then in effect did not authorize paternity proceedings by fathers. It was not, or could it have been, an adjudication on the merits. Thus, the doctine of res judicata does not apply."

There appears to the Court to be no meaningful distinction to be drawn between Plaintiff's action in the case at bar, filing a second suit in a state having personal and subject matter jurisdiction but lacking the anti-deficiency bar of California, and W.R.S.'s action of refiling his paternity suit in the same state, but after a change in the law. In neither case does the first unfavorable decision constitute a determination or adjudication on the merits.

Thus, Plaintiff's Motion for Summary Judgment is granted, and Defendant's Motion for Summary Judgment is denied. Plaintiff shall prepare the appropriate order. The matter is continued to the October 14, 1986 trial date for determination of the issue of attorneys fees, and any other remaining unresolved issues.

Dated this 8 day of October, 1986.

BY THE COURT:

/s/ James H. Hiatt
District Judge

APPENDIX E

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Attorney for STEVEN G. LILVES,
Defendant and Cross-Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN

Plaintiff: KIMBEL J. STUART vs. Defendant: STEVEN G. LILVES, and DOES 1 through 5, inclusive	NO. 121198 *ORDER FOR ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT* (Filed October 11, 1985)
Cross-Complainant: STEVEN G. LILVES vs. Cross-Defendants: KIMBELL J. STUART, and DOES 1 through 10, inclusive	

The motion of Defendant, STEVEN G. LILVES, for Summary Judgment was regularly heard on October 11, 1985. Defendant's attorney, CHARLES B. TUNNELL, ESQUIRE appeared on behalf of Defendant, STEVEN LILVES. Neither Plaintiff nor Plaintiff's attorney, DAVID C. MACPHERSON, ESQUIRE made an appearance on behalf of Plaintiff, Plaintiff having heretofore filed "Plaintiff's Statement of Non Opposition to Defendant's Motion

for Summary Judgment. After full consideration of moving and responding papers, all supporting papers, and oral arguments of counsel, it appears and the Court finds that Defendant, STEVEN G. LILVES, has shown by admissible evidence and reasonable inferences from that evidence that the action of Plaintiff has no merit, and that Plaintiff has presented no triable issue of fact.

The Court finds as follows:

1. On or about May 7, 1981, while residing in the Town of Corte Madera, County of Marin, State of California, Defendant, STEVEN G. LILVES, purchased from Plaintiff, KIMBEL J. STUART, improved real property, commonly known as 1224 Maple Street, Fort Collins, Colorado more particularly described as follows:

> That portion of Lots 8 and 9, Tennyson Heights, City of Fort Collins, County of Larimer, State of Colorado, more particularly described as follows:
>
> Beginning at the Southeast corner of said Lot 8; thence along the South line of Lot South 88°29'55" West 31.70 feet to the TRUE POINT OF BEGINNING: thence along the East line of the West 77.20 feet of said Lot 8, North 1°45'04" West 249.67 feet to the South line of the North 150.00 feet of said Lot 8, and 9; thence along said South line South 88°29'55" West 100.00 feet to the West line of the East 22.80 feet of said Lot 9; thence along said West line South 1°45'04" East 59.67 feet; thence North 88°29'55" East 80.00 feet; thence South 1°45'04" East 190.00 feet to the South line of said Lot; thence along said South line, North 88°29'55" East 20.00 feet more or less to the TRUE POINT OF BEGINNING.
>
> Together with a easement for parking, ingress and egress over the South 190.00 feet of the East 50.00 feet of the West 77.20 feet of Lot 8, Tennyson Heights,

City of Fort Collins, County of Larimer, State of Colorado.

2. At the time of the purchase of the above-described real property by Defendant from Plaintiff, said Defendant caused to be executed and delivered by his attorney-in-fact, DEBRA J. ANDREWS to Plaintiff a Promissory Note and a Purchase Money Deed of Trust, both documents dated May 7, 1981, the latter of which (Purchase Money Deed of Trust) was for the purpose of securing the unpaid balance of the purchase price.

3. The contract was entered into by Defendant, STEVEN G. LILVES, and Plaintiff in the County of Marin, State of California and said Defendant lived in the County of Marin, State of California when the contract was entered into and said Defendant currently lives in the County of Marin, State of California. The contract entered into was performable in the County of Marin, State of California.

4. The Promissory Note and Purchase Money Deed of Trust executed by Defendant, STEVEN G. LILVES, in favor of Plaintiff, KIMBEL J. STUART, as recited herein was junior to a Deed of Trust executed by KIMBEL J. STUART to the Public Trustee of Larimer County for the use of the First Capitol Mortgage Company to secure an obligation of One Hundred Seven Thousand Dollars ($107,000.00) dated May 1, 1981 and recorded May 8, 1981 in Book 2114 at page 972 of the records of the County of Larimer, Colorado, which encumbrance Defendant assumed at the time of purchase.

5. On January 11, 1984, the senior lienholder through Public Trustee (Public Trustee No. LB4561) initiated foreclosure proceedings with respect to the above-described property.

6. The property was sold pursuant to the provisions of the Senior Deed of Trust by the Public Trustee on March 7, 1984.

7. On January 8, 1985, Plaintiff, KIMBEL J. STUART, filed the within lawsuit (Case No. 121198) in the Superior Court of California for the County of Marin pursuant to which Plaintiff sought to recover a deficiency judgment against Defendant, STEVEN G. LILVES in the full amount of the note secured by the Purchase Money Deed of Trust plus attorney's fees.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in accordance with this order in favor of Defendant, STEVEN G. LILVES and against Plaintiff, KIMBEL J. STUART as prayed for in the Answer of Steven G. Lilves to the Complaint of Plaintiff for Breach of Contract and Common Counts.

Dated: OCT 11 1985

HENRY J. BRODERICK
JUDGE OF THE SUPERIOR COURT

APPENDIX F

CONSTITUTION

of the

UNITED STATES OF AMERICA

ARTICLE IV. – RELATIONS BETWEEN STATES

Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 USCS § 1738

§ 1738. State and Territiorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith

and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, § 1, 62 Stat. 947.)

CALIFORNIA CODE OF CIVIL PROCEDURE

SECTION 580(b)

No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four (4) families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser.

Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at anytime under any one thereof if no deficiency judgment would lie under the deed of trust or mortgage on real property.

Supreme Court, U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1702

In The

Supreme Court of the United States

October Term, 1988

STEVEN G. LILVES,

Petitioner,

vs.

KIMBEL J. STUART,

Respondent.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34 pp

I.

QUESTION PRESENTED FOR REVIEW

A. WHETHER AN UNCONTESTED SUMMARY JUDGMENT ORDER BY A CALIFORNIA SUPERIOR COURT BASED SOLELY ON CALIFORNIA STATUTORY LAW SUMMARILY PRECLUDING RESPONDENT'S CLAIM IS A FINAL JUDGMENT ON THE MERITS ENTITLED TO RES JUDICATA EFFECT IN THE STATE OF COLORADO.

II.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the parties shown in the caption.

Counsel for the Respondent, Kimbel J. Stuart, is James A. Martell, Esq., of Wyatt and Martell, Fort Collins, Colorado 80521. Counsel for the Petitioner at the Colorado trial and before the Colorado Court of Appeals was James K. Keane, Esq., of Boulder, Colorado 80302, and Mr. Keane and Irvin M. Kent, Esq., of Aurora, Colorado 80010, as co-counsel for Petitioner's Petition for Writ of Certiorari to the Colorado Supreme Court.

In the California action, the Respondent was represented by David C. MacPherson, Esq., and Petitioner was represented by Charles B. Turnell, Esq., both members of the California Bar.

III.

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IV.

DECISIONS BELOW

(None of these have been reported)

A. Order of the Supreme Court, State of Colorado, denying Mr. Lilves' Petition for Writ of Certiorari dated February 27, 1989.

B. Order of the Colorado Court of Appeals denying Mr. Lilves' Petition for Rehearing dated November 3, 1988.

C. Decision of the Colorado Court of Appeals dated October 6, 1988, in Stuart v. Lilves, No. 87 CA 0623.

D. Order of the District Court of Larimer County dated October 8, 1986, in Stuart v. Lilves, No. 85 CV 1052.

E. Order for Entry of Summary Judgment in Favor of Defendant dated October 11, 1985, in Stuart v. Lilves, No. 121198, Superior Court of the State of California, County of Marin.

V.

JURISDICTIONAL STATEMENT

A. Decision of the Colorado Court of Appeals announced October 6, 1988.

B. Order of the Colorado Court of Appeals denying rehearing, November 3, 1988.

C. Order of the Supreme Court, State of Colorado, denying Petition for Certiorari, February 27, 1989.

D. The Respondent does not believe this matter is within the provisions of 28 USC 1257(a).

VI.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND CODE PROVISIONS

A. Constitution of the United States, Article IV, Section 1.

B. California Code of Civil Procedure, Sec. 580(b) (all set forth in Appendix F)

VII.

STATEMENT OF THE CASE

On May 7, 1981, the Petitioner, acting through his attorney-in-fact, Debra J. Andrews, executed a Promissory Note in Colorado payable to the Respondent in Colorado, in the original principal amount of $18,000. The Promissory Note was secured by a Deed of Trust representing a lien against certain real property located in Larimer County, Colorado, in the City of Fort Collins. The Petitioner failed to make any payments on the Promissory Note, and on January 8, 1985, the Respondent filed a Complaint in the State of California against the Petitioner to collect the amount owing on the Promissory Note. On August 30, 1985, the Petitioner filed a Motion for Summary Judgment in the California action, arguing that Section 580(b) (Appendix F – Page 15) of the California Code of Civil Procedure prohibited the Respondent's collection of the Note as a deficiency judgment. On October 11, 1985, the Superior Court of California granted the Defendant's Motion for Summary Judgment in accordance with a statement of nonopposition filed by the Respondent informing the court the Respondent would

proceed to obtain a Colorado judgment against the Petitioner.

On August 28, 1985, Respondent filed his action against the Petitioner in Larimer County District Court, Case No. 85 CV 1052. The Respondent and the Petitioner each filed Motions for Summary Judgment. The trial court found in favor for the Respondent, determining the California judgment was not a decision on the merits of the Respondent's claim, and therefore, the Respondent's Colorado action was not barred by the doctrine of res judicata.

The Petitioner appealed to the Colorado Court of Appeals, which affirmed the decision of the trial court. After denial of his Petition for Rehearing, Petitioner filed a Petition for Certiorari to the Supreme Court of the State of Colorado. This Petition was also denied.

VIII.

SUMMARY OF ARGUMENT

There are no special or important reasons to grant the Petition for a Writ of Certiorari. The decisions of the trial court and the Colorado Court of Appeals are proper applications of the doctrine of res judicata to the facts at issue. These decisions do not evade or ignore the Full Faith and Credit Clause of the Constitution of the United States. Consequently, these decisions do not decide an important question of federal law which has not been, but should be, settled by this Court, nor have they decided a

federal question in a way in conflict with applicable decisions of this Court.

IX.

ARGUMENT

The decisions the Petitioner seeks this Court to review concern a solitary issue. As stated by the trial court, "The only issue to be resolved is whether or not the California order granting Defendant's Motion for Summary Judgment due to the anti-deficiency statute constitutes a judgment *on the merits,* so the Colorado action is barred by the doctrine of res judicata." (Appendix D – Page 7) The trial court determined the California decision was based on a statutory bar that rendered the Respondent's claim unenforceable in California. The trial court ruled the merits of the Respondent's claim could not have been reached by the California court because of the anti-deficiency statutory bar. (Appendix D – Pages 7 and 8) The trial court found the dismissal of the Respondent's action in California was more analogous to a dismissal for want of jurisdiction that to a ruling on the merits, citing *Trujillo v. State of Colo.*, 649 F.2d 823 (10th Cir. 1981). The trial court also relief on the case of *W.R.S. v. E.R.*, 588 P.2d 379 (Colo. App. 1978). In this case, a paternity action was dismissed because Colorado law did not allow a putative father to bring such an action. The law later changed and the court found the second action was not barred by the doctrine of res judicata. The court held the first action was dismissed because the statute did not

allow the proceeding, and therefore, it was not, nor could it have been, an adjudication on the merits.

The Colorado Court of Appeals, in affirming the trial court's decision, found res judicata applies only to judgments on the merits. The court found a judgment based on preliminary, subsidiary, or technical grounds is not on the merits, citing *Saunders v. Bankston*, 506 P.2d 1253 (Colo. App. 1972). The court also ruled the trial court had correctly concluded that the merits of the Respondent's claim had not been reached by the California decision because the claim was precluded by statute, citing *W.R.S. v. E.R.*, 588 P.2d 379 (Colo. App. 1978).

The decisions of the trial court and the Colorado Court of Appeals are consistent with the decisions of this Court. This Court and the federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment *on the merits* of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Allen v. McCurry*, 499 U.S. 90 (1980); *Cromwell v. County of Sac*, 94 U.S. 351 (1877). This Court has also repeatedly recognized the general limitation that res judicata and collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the issue in the earlier case. *Allen, supra; Montana v. United States*, 440 U.S. 147, 153 (1979); and *Blounder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971). The decisions of the trial court and the Colorado Court of Appeals are proper applications of the

doctrine of res judicata to the facts at issue. These decisions are in complete accord with the decisions of this Court and the relevant federal law.

The Petitioner argues the decisions of the trial court and Colorado Court of Appeals violate the Full Faith and Credit Clause of the United States Constitution because they do not give the California decision the res judicata effect it would be accorded in California, citing *Durfree v. Duke,* 375 U.S. 106 (1963). The *Durfree* case held that a judgment is entitled to full faith and credit, even as to questions of jurisdiction, when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. The California decision barring the Respondent's claim based on the anti-deficiency statute was not a decision that fully and fairly litigated the issues presented by the Respondent's claim on the Promissory Note. Consequently, the Full Faith and Credit Clause does not require the Colorado courts to give res judicata effect to that decision.

Colorado has consistently held that a foreign judgment is entitled to full faith and credit to the extent that it is a final judgment on the merits and unmodifiable. *See Glickman v. Mesign,* 615 P.2d 23 (Colo. 1980); *Gruber v. Wallner,* 598 P.2d 135 (Colo. 1979); *Newman v. Bullock,* 47 P. 379 (Colo. 1896). The California decision was not a decision on the merits. Thus, the Full Faith and Credit Clause of the United States Constitution does not preclude the enforcement of the Colorado decision.

The Petitioner cites the case of *Prunty v. Bank of America,* 112 Cal. Rptr. 370, 374-375 (1974), to support his

argument that the California decision barring the Respondent's claim would be entitled to res judicata effect in California. The *Prunty* case does not address the issue of whether a decision barring a claim based on the anti-deficiency statute is a decision on the merits of the claim. California law is consistent with Colorado law in providing that res judicata will only preclude a claim that has already been litigated between the same parties on the same cause of action by a competent court with proper jurisdiction that has rendered a final judgment on the merits. *See Los Angeles Branch N.A.A.C.P. v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1984), *cert. denied* 474 U.S. 919 (1984); *Shuffer v. Board of Trustees of Calif. State Univ. and Colleges*, 136 Cal. Rptr. 527 (Cal. App. 1977). California law is also consistent with Colorado law in holding that a dismissal of an action on merely technical, preliminary, or subsidiary grounds is not a judgment on the merits. See *Kahn v. Kahn*, 137 Cal. Rptr. 332 (Cal. App. 1977).

California law is in accord with Colorado law in finding that an action precluded by a statutory bar is not a judgment on the merits. In the case of *Folden v. Lobrovich*, 314 P.2d 56 (Cal. App. 1957), the California court found an action brought by a partnership that was dismissed because the partners had failed to comply with California's statutory requirements for registration was not an adjudication on the merits. The court found the judgment did not have res judicata effect on a subsequent action brought by the partners against the same defendants on the same contract.

X.

CONCLUSION

The decisions to be reviewed are proper applications of the doctrine of res judicata to the facts at issue. In determining the California judgment was not a decision on the merits of the Respondent's claims, the courts did not ignore or evade the Full Faith and Credit Clause of the United States Constitution. These decisions do not decide an important question of federal law that has not been, but should be, decided by this Court nor do they decide a federal question in a way in conflict with applicable decisions of this Court. Consequently, there are no special or important reasons to grant the Petitioner's Petition for a Writ of Certiorari, and consequently, the Petition should be denied.

Respectfully submitted,

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Attorney for Respondent,
Kimbel J. Stuart

APPENDIX A

COLORADO COURT OF APPEALS

No. 87CA0623

KIMBEL J. STUART,
Plaintiff-Appellee,
v.
STEVEN G. LILVES,
Defendant-Appellant.

Not Selected for Publication

Appeal from the District Court of Larimer County
No. 85CV1052

Honorable James H. Hiatt, Judge
(Filed October 6, 1988)

DIVISION I JUDGMENT AFFIRMED
Opinion by JUDGE PIERCE
Sternberg and Reed, JJ., concur

Wyatt & Martell
James A. Martell
Fort Collins, Colorado
Attorneys for Plaintiff-Appellee

James J. Keane
Boulder, Colorado
Attorney for Defendant-Appellant

Defendant, Steven G. Lilves, appeals a summary judgment entered in favor of plaintiff, Kimbel J. Stuart. We affirm.

Plaintiff originally filed suit in California. That court granted summary judgment in favor of defendant based on a finding that the action was barred by California statute. Defendant contends that the doctrine of *res judicata* barred this subsequent suit. We disagree.

If there is an existing judgment, the doctrine of *res judicata* bars any subsequent suit between the parties on the same claim. *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985). However, *res judicata* applies only to a judgment on the merits. A judgment based on preliminary, subsidiary or technical grounds is not on the merits. *Saunders v. Bankston*, 31 Colo. App. 551, 506 P.2d 1253 (1972).

The trial court correctly concluded that the merits of plaintiff's claim had not been reached because the claim was precluded by statute. *See W.R.S. v. E.R.*, 41 Colo. App. 414, 588 P.2d 379 (Colo. App. 1978).

Defendant's contention regarding attorney fees cannot be reviewed as the transcript of the hearing on that issue was not included in the record on appeal. That decision is one within the discretion of the trial court, and, without a showing otherwise, no abuse of that discretion is assumed. *See In re Marriage of Hahn*, 628 P.2d 175 (Colo. App. 1981).

Judgment affirmed.

JUDGE STERNBERG and JUDGE REED concur.

APPENDIX B

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 87CA0623

ORDER

KIMBEL J. STUART, v. STEVEN G. LILVES,

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 12-5-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Pierce, J
Sternberg, J
Reed, J

[Seal]

DATED: 11-3-88

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 88SC588
Certiorari to the Colorado Court of Appeals 87CA0623
Larimer County District Court 85CV1052

ORDER OF COURT
(Filed February 27, 1989)

STEVEN G. LILVES,

Petitioner,

v.

KIMBEL J. STUART,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 27, 1989.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

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James J. Keane
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Honorable James H. Hiatt
Larimer County District Court
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[Seal]

APPENDIX D

DISTRICT COURT, LARIMER COUNTY,
STATE OF COLORADO

Case No. 85CV1052

ORDER

KIMBEL J. STUART,

Plaintiff,

vs.

STEVEN G. LILVES,

Defendant.

THIS MATTER is before the undersigned District Judge with regard to Plaintiff's and Defendant's Motion for Summary Judgment. This action was brought by Plaintiff against Defendant as a suit on a promissory note executed on May 7, 1981, in the original amount of $18,000.00, and secured by a deed of trust constituting a lien on property to be found within Larimer County. The note is now in default.

Each side previously filed a Motion for Summary Judgment which was denied by the Court. Thereafter, the parties jointly filed a Motion for Reconsideration, requesting that the Court reconsider the issue of summary judgment, each party asserting therein that there were no contested issues of material fact, and that, as a matter of law, one party or the other was entitled to summary judgment. It appears that since the Court initially denied both motions for summary judgment, Defendant has abandoned his defense of lack of personal

jurisdiction, and has submitted to the jurisdiction of the Court and agrees that this Court has personal jurisdiction over him (see paragraph 11 of the Motion for Reconsideration).

The only issue to be resolved by the Court is whether the doctrine of res judicata bars Plaintiff's action. Plaintiff initially filed an action on the same promissory note against Defendant in the state of California, this lawsuit being filed on January 8, 1985. On October 11, 1985, the California court granted Defendant's Motion for Summary Judgment, finding that the California lawsuit was barred by California's anti-deficiency statute (Section 580(b) of the California Code of Civil Procedure). Colorado has no such bar. Plaintiff then pursued this action in Colorado.

The parties agree that four of the five criteria necessary for the doctrine of res judicata to be invoked exist in this case. That is, the parties are identical, the cause of action is identical, the California order is a final judgment (the same was not appealed by Plaintiff), and the California court was a competent court having personal and subject matter jurisdiction. The only issue to be resolved is whether or not the California order granting Defendant's Motion for Summary Judgment due to the anti-deficiency statute constitutes a judgment *on the merits*, so that the Colorado action is barred by the doctrine of res judicata. The Court concludes that the California order was not a judgment on the merits, so that the doctrine of res judicata does not bar Plaintiff's Colorado suit. This is so not because the issue was presented to the court in California by means of a motion for summary judgment, but because the grounds relied upon by the court did not

go to the merits of Plaintiff's Complaint, but related to a statutory bar rendering such claim unenforcable in California. Indeed, the merits of Plaintiff's claim could not have been reached by the California court because of Section 580(b), California Code of Civil Procedure. See *Smith vs. Cowell,* 92P20, 41, 178 (Colo. 1906); *Dash vs. Rubey,* 357 P2d 81, 144 Colo. 481 (Colo. 1961); *Board of Commissioners of Lake County vs. Schradsky,* 71P1104, 31 Colo. 178 (Colo. 1903). Dismissal of Plaintiff's action in California on the grounds stated by the California court is more analogous to dismissal for want of jurisdiction than to a ruling on the merits. See also *Trujillo vs. State of Colorado,* 649F 2d 823, C.A. Colo. 1981.

It appears to the Court that the case which most closely approaches the facts and the legal issues in the case at bar is *W.R.S. vs. E.R.,* 588 P2d 379, 41 Colo.App. 414 (Colo. App. 1978). In that case an individual brought a paternity action, which was dismissed on the grounds that the paternity laws as they then existed did not allow a putative father to bring such an action. Thereafter, the law changed, the Uniform Parentage Act having been adopted in 1977. Subsequent to the effective date of such Act, the individual brought another paternity action. Respondent alleged and the trial court concluded that the putative father was barred by the doctrine of res judicata from pursuing his second paternity action. On appeal the Colorado Court of Appeals stated that "the 1974 action was dismissed because the statute then in effect did not authorize paternity proceedings by fathers. It was not, or could it have been, an adjudication on the merits. Thus, the doctine of res judicata does not apply."

There appears to the Court to be no meaningful distinction to be drawn between Plaintiff's action in the case at bar, filing a second suit in a state having personal and subject matter jurisdiction but lacking the anti-deficiency bar of California, and W.R.S.'s action of refiling his paternity suit in the same state, but after a change in the law. In neither case does the first unfavorable decision constitute a determination or adjudication on the merits.

Thus, Plaintiff's Motion for Summary Judgment is granted, and Defendant's Motion for Summary Judgment is denied. Plaintiff shall prepare the appropriate order. The matter is continued to the October 14, 1986 trial date for determination of the issue of attorneys fees, and any other remaining unresolved issues.

Dated this 8 day of October, 1986.

BY THE COURT:

/s/ James H. Hiatt
District Judge

APPENDIX E

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Attorney for STEVEN G. LILVES,
Defendant and Cross-Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN

Plaintiff: KIMBEL J. STUART

vs.

Defendant: STEVEN G. LILVES, and DOES 1 through 5, inclusive

NO. 121198

ORDER FOR ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

(Filed October 11, 1985)

Cross-Complainant: STEVEN G. LILVES

vs.

Cross-Defendants: KIMBELL J. STUART, and DOES 1 through 10, inclusive

The motion of Defendant, STEVEN G. LILVES, for Summary Judgment was regularly heard on October 11, 1985 Defendant's attorney, CHARLES B. TUNNELL, ESQUIRE appeared on behalf of Defendant, STEVEN LILVES. Neither Plaintiff nor Plaintiff's attorney, DAVID C. MACPHERSON, ESQUIRE made an appearance on behalf of Plaintiff, Plaintiff having heretofore filed "Plaintiff's Statement of Non Opposition to Defendant's Motion

for Summary Judgment. After full consideration of moving and responding papers, all supporting papers, and oral arguments of counsel, it appears and the Court finds that Defendant, STEVEN G. LILVES, has shown by admissible evidence and reasonable inferences from that evidence that the action of Plaintiff has no merit, and that Plaintiff has presented no triable issue of fact.

The Court finds as follows:

1. On or about May 7, 1981, while residing in the Town of Corte Madera, County of Marin, State of California, Defendant, STEVEN G. LILVES, purchased from Plaintiff, KIMBEL J. STUART, improved real property, commonly known as 1224 Maple Street, Fort Collins, Colorado more particularly described as follows:

> That portion of Lots 8 and 9, Tennyson Heights, City of Fort Collins, County of Larimer, State of Colorado, more particularly described as follows:
>
> Beginning at the Southeast corner of said Lot 8; thence along the South line of Lot South 88° 29'55" West 31.70 feet to the TRUE POINT OF BEGINNING: thence along the East line of the West 77.20 feet of said Lot 8, North 1° 45'04" West 249.67 feet to the South line of the North 150.00 feet of said Lot 8, and 9; thence along said South line South 88° 29'55" West 100.00 feet to the West line of the East 22.80 feet of said Lot 9; thence along said West line South 1° 45'04" East 59.67 feet; thence North 88° 29'55" East 80.00 feet; thence South 1° 45'04" East 190.00 feet to the South line of said Lot; thence along said South line, North 88° 29'55" East 20.00 feet more or less to the TRUE POINT OF BEGINNING.
>
> Together with a easement for parking, ingress and egress over the South 190.00 feet of the East 50.00 feet of the West 77.20 feet of Lot 8, Tennyson Heights,

City of Fort Collins, County of Larimer, State of Colorado.

2. At the time of the purchase of the above-described real property by Defendant from Plaintiff, said Defendant caused to be executed and delivered by his attorney-in-fact, DEBRA J. ANDREWS to Plaintiff a Promissory Note and a Purchase Money Deed of Trust, both documents dated May 7, 1981, the latter of which (Purchase Money Deed of Trust) was for the purpose of securing the unpaid balance of the purchase price.

3. The contract was entered into by Defendant, STEVEN G. LILVES, and Plaintiff in the County of Marin, State of California and said Defendant lived in the County of Marin, State of California when the contract was entered into and said Defendant currently lives in the County of Marin, State of California. The contract entered into was performable in the County of Marin, State of California.

4. The Promissory Note and Purchase Money Deed of Trust executed by Defendant, STEVEN G. LILVES, in favor of Plaintiff, KIMBEL J. STUART, as recited herein was junior to a Deed of Trust executed by KIMBEL J. STUART to the Public Trustee of Larimer County for the use of the First Capitol Mortgage Company to secure an obligation of One Hundred Seven Thousand Dollars ($107,000.00) dated May 1, 1981 and recorded May 8, 1981 in Book 2114 at page 972 of the records of the County of Larimer, Colorado, which encumbrance Defendant assumed at the time of purchase.

5. On January 11, 1984, the senior lienholder through Public Trustee (Public Trustee No. LB4561) initiated foreclosure proceedings with respect to the above-described property.

6. The property was sold pursuant to the provisions of the Senior Deed of Trust by the Public Trustee on March 7, 1984.

7. On January 8, 1985, Plaintiff, KIMBEL J. STUART, filed the within lawsuit (Case No. 121198) in the Superior Court of California for the County of Marin pursuant to which Plaintiff sought to recover a deficiency judgment against Defendant, STEVEN G. LILVES in the full amount of the note secured by the Purchase Money Deed of Trust plus attorney's fees.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in accordance with this order in favor of Defendant, STEVEN G. LILVES and against Plaintiff, KIMBEL J. STUART as prayed for in the Answer of Steven G. Lilves to the Complaint of Plaintiff for Breach of Contract and Common Counts.

Dated: OCT 11 1985

HENRY J. BRODERICK
JUDGE OF THE SUPERIOR COURT

APPENDIX F

CONSTITUTION

of the

UNITED STATES OF AMERICA

ARTICLE IV. – RELATIONS BETWEEN STATES

Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

CALIFORNIA CODE OF CIVIL PROCEDURE

SECTION 580(b)

No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four (4) families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser.

Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at

anytime under any one thereof if no deficiency judgment would lie under the deed of trust or mortgage on real property.